08-782

Supreme Court, U.S
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In The

Supreme Court of the United States

THE CALIFORNIA SPEEDWAY CORPORATION,

Petitioner,

v.

ROBERT MILLER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Respondent, Robert Miller, objects to the "Question Presented" found in the Petition for Writ of Certiorari as it unfairly presents the question. California Speedway presents the question as, "Must a court afford deference to a government agency's interpretation of ambiguous regulatory language, where the proffered interpretation covers a subject matter ***that the agency*** intentionally ***excluded from the scope of its notice and comment rule-making***?" As discussed below, the "subject matter" was expressly covered in the notice and comment period and it was an advisory board, not the "agency," that authored ambiguous comments about the potential scope of the regulations. Thus, a proper "Question Presented" would read:

Should a court afford deference to a government agency's interpretation of regulatory language, where: (1) the proffered interpretation is entirely consistent with the regulation; (2) the agency has never given a conflicting or different interpretation; but (3) an advisory board – not the agency – made some off-hand comments about the potential scope of the proposed regulations, which comments are not binding on the agency and were never adopted by the agency?

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STATEMENT OF THE CASE

Respondent, Robert Miller, is a 58 year-old quadriplegic who must use an electric wheelchair for mobility. He lives in Highland, California, about 20 minutes from the California Speedway located in Fontana, California. He is an avid fan of NASCAR and has gone to the California Speedway three times a year, every year from the inaugural race in 1997 to 2003 and six times a year from 2004 to the present. Mr. Miller filed suit against the California Speedway because of his great frustration over the wheelchair-seating situation. Mr. Miller misses the best parts of every race. When the spectators in the row directly in front of him (directly in front of the wheelchair seating area) stand up, they completely block his view of the race. This happens all the time because spectators stand during all the key and exciting moments of the race. He cannot even see the track over the standing spectators.

Mr. Miller filed suit under Title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12181, *et seq.* (Pet. App. 3). The district court granted California Speedway's motion for summary judgment on the basis that the ADA did not require line of sight over standing spectators. (Pet. App. 3). The Ninth Circuit reversed the judgment, concluding that the implementing regulations, found in the Code of Federal Regulations, required the California Speedway to provide line of sight over standing spectators. (Pet. App. 3).

The Ninth Circuit's decision noted that it was uncontested (and uncontestable) by any party that the regulation at issue was a reasonable interpretation of the ADA and "would clearly pass muster if challenged under the ADA." (Pet. App. 12). Instead, the challenge was to the Department of Justice's ("DOJ") formal interpretation of the regulation found in the 1994 supplement to its Technical Assistance Manual ("TAM"). The Ninth Circuit joined with the D.C. Circuit in deciding that the DOJ's interpretation was consistent with the regulation and entitled to substantial deference.

REASONS FOR DENYING THE WRIT

While it is true that the Third Circuit has reached a different conclusion than the Ninth and D.C. Circuits about how much deference to grant the DOJ's interpretation of "line of sight" in stadium design, the issue is of limited importance and limited scope; it does not warrant review by this Court. First, the DOJ is publishing new regulations this year which will end all future controversies for new construction. Thus, only stadiums built between 1992 and 2009 would be covered by the original regulation. Second, because the subject matter at issue is, essentially, the interpretation of a building code, there is less concern about "inconsistent" standards. Stadiums do not travel. They will not cross Circuit lines. Finally, the disagreements between the Circuits are not about legal standards or statements of the law

but about the application of agreed-upon legal principles. This is simply not an "extraordinary case of peculiar gravity and general importance" (36 C.J.S. Federal Courts § 291) that would warrant Supreme Court review.

I. THE "UNIFORM" RULE DEMANDED BY THE PETITIONER WILL BE IMPLEMENTED THIS YEAR

In urging this Court to grant the petition for writ of certiorari, the California Speedway argues that, "a uniform rule is warranted and urgently needed." (Pet. 9). First, it should be noted that the regulation at issue in this case, and the DOJ's formal interpretation of that regulation, has been published and available since 1994. 28 C.F.R., Part 36, App. A, § 4.33.3, as interpreted by TAM § III-7.5180 (1994 Supp.). Any contractor, architect, or stadium designer considering the requirements of the ADA has to simply review the Americans with Disabilities Act Accessibility Guidelines and the Technical Assistance Manual to understand what is required. Only someone who fails to consult the published material would run afoul of the clearly stated standard.

Additionally, in November of 1999, the Access Board proposed amendments to its guidelines to explicitly address the standing spectator problem. 64 Fed. Reg. 62,248, 62,501-02 (1999). These were adopted in July 2004. 69 Fed. Reg. 44,083 (2004). Guideline 802.2 now distinguishes between "lines of

sight over seated spectators" and "lines of sight over standing spectators." 69 Fed. Reg. at 44,391-33. On June 17, 2008, it published proposed regulations that would amend the DOJ's ADA regulations. *See* 73 Fed. Reg. 34,508 (2008). On August 18, 2008, the Notice of Proposed Rule Making (NPRM) comment period ended.[1] Final action is slated for January of 2009.[2] Thus, from 2009 onward, the requirement for line of sight over standing spectators will be found in the regulations themselves, rather than in the TAM. Thus, there is no need for Supreme Court review to provide the "uniform rule" demanded in the petition for writ. An opinion by this Court simply will not have the widespread application anticipated by the petitioner.

II. THE SPLIT BETWEEN THE THIRD CIRCUIT AND THE OTHER CIRCUITS IS OF LIMITED CONCERN

There are numerous cases where inconsistent federal standards can create significant problems. Laws that govern behavior or expression are especially troublesome. Those concerns are not implicated in this case. Although the statute involved is a civil rights statute, the regulation implicated in this case is, essentially, a building code. Because the vast majority of building codes are found in State regulations, it is

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[1] http://www.reginfo.gov/public/do/eoReviewSearch

[2] http://www.reginfo.gov/public/do/eoReviewSearch

already a fact of life that building codes change from one Circuit to the next. Because stadiums do not travel and do not cross Circuit lines, the fact that a stadium being built somewhere in the Third Circuit may have a different code to meet than a building being built in the Ninth/D.C. Circuits does not implicate the type of concern that justifies Supreme Court review. The matter must be "special and important" and not involve merely academic or episodic problems. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1955) (construing an earlier version of U.S.Sup.Ct. Rule 10).

III. THE PETITION SHOULD BE DENIED BECAUSE CHALLENGED ERROR IS ONE OF APPLICATION

The petition should be denied because the asserted error consists of a misapplication of a properly stated rule of law. In this case, the Circuits do not disagree with each other about the appropriate legal principles. Instead, the disagreement is merely one of application and, therefore, should not be the subject of Supreme Court review. "A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." U.S.Sup.Ct. Rule 10.

As the Ninth Circuit noted, no party in this case and no previously published decision has contested the validity of the regulation itself. (Pet. App. 12). That regulation, section 4.33.3 of the Americans with

Disabilities Act Accessibility Guidelines ("ADAAG") is titled "Placement of Wheelchair Locations" and reads, in pertinent part: "*Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.*" In November of 1994, the Department of Justice issued a formal interpretation of that section, printed in the Technical Assistance Manual, that reads: "*in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand. . . .*" The Ninth Circuit held that:

> The DOJ's 1994 interpretation is consistent with the statutory requirement that the facilities be "readily accessible to" and "usable by" persons with disabilities. 42 U.S.C. § 12183(a)(1). To meaningfully use the Speedway facilities, a wheelchair patron needs to be able to see the event in the circumstances in which the race typically takes place, with a standing audience. Otherwise the Speedway race track is not "usable" as a practical matter. Because the DOJ's interpretation is a reasonable, practical construction in light of the ambiguity of the regulation, it is entitled to substantial deference.

(Pet. App. 17-18). On this point, the Circuits agree. If an agency interpretation is entirely consistent with

the regulations, it is entitled to substantial deference. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

In the present case, the Third Circuit does not disagree that the DOJ's interpretation is a reasonable reading. *See Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 193 F.3d 730, 733 (3rd Cir. 1999). ("both readings of the rule are plausible and consistent with the ADA's purpose of enabling people with disabilities to share equally in the benefits. . . ."). Moreover, both Ninth Circuit and Third Circuit are in agreement that an agency is not free to simply change a legislative rule without going through the notice and comment procedures of the Administrative Procedures Act. *See Blockbuster*, 193 F.3d at 737 and *Miller v. California Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008). The disagreement between the Circuits is two-fold and both are disagreements in application, *i.e.*, whether the commentary by the Access Board is imputed to the DOJ and whether the comments are interpretive or legislative.

First, the Circuits disagree over whether the comments by the Access Board should be imputed to the DOJ. The Third Circuit thought they should: "we respectfully disagree with the District of Columbia Circuit's conclusion that the DOJ did not adopt what the Access Board had said. Instead, we conclude that the DOJ implicitly adopted the Access Board's analysis of 4.33.3." *Blockbuster,* 193 F.3d at 736. The Ninth Circuit reached a different conclusion: "When the

DOJ adopted the Access Board's guidelines as its own standards, it literally adopted the *guidelines* . . . It did not adopt any other Access Board commentary, notices of proposed rulemaking, or internal memoranda. Whatever the *Access Board* thought of its own guidelines, the *Department of Justice* adopted the text of the guidelines themselves, not the Access Board's interpretation of that text." *Miller*, 536 F.3d 1020 at 1031-1032. Thus, the disagreement is one of application. The Circuits simply reached different conclusions about a fact, *i.e.*, whether the DOJ adopted the Access Board's commentary along with the regulations.

Second, the Circuits disagree over whether the Access Board's commentary is legislative or interpretive. The Third Circuit felt that the commentary was legislative and held, "An agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning." *Blockbuster*, 193 F.3d at 737 (citations omitted). The Ninth Circuit disagreed:

> We think that, even if the DOJ's interpretation constituted a change in the understanding of its original regulations, the DOJ was not required to proceed by notice and comment because both the Access Board's original position (as imputed to the DOJ) and the TAM would ***constitute interpretive rules***. *See* 5 U.S.C. § 553(b)(3)(A); *Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir.2004) (holding that an agency can modify an interpretive

> rule without notice and comment). An interpretive rule is one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995) (quotation marks and citation omitted). "[I]nterpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule," whereas legislative rules "create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir.2003).

Miller, 536 F.3d at 1033 (emphasis added).

Thus, the disagreements between the Circuits are one of application, not of legal principles. As such, this is not a case which warrants Supreme Court review.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that the petition for writ of certiorari be denied in its entirety.

January 14, 2009

Respectfully submitted,

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